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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

Docket No. 0907301210-3071-03

RIN 0648-AX83

Gulf of the Farallones and Monterey Bay National Marine Sanctuaries Regulations on Introduced Species

AGENCY: Office of National Marine Sanctuaries (ONMS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of proposed rulemaking; withdrawal.

SUMMARY: This action withdraws a notice of proposed rulemaking (NPRM) published in the **Federal Register** on October 1, 2009 (74 FR 50740) concerning regulations on the introduction of introduced species into Gulf of the Farallones and Monterey Bay national marine sanctuaries. The proposed rule was issued in response to an objection received from the then-Governor of California, pursuant to section 304(b)(1) of the National Marine Sanctuaries Act (16 U.S.C. 1434(b)(1)), regarding changes to terms of designations and corresponding regulations for the two national marine sanctuaries that had been published as final on November 28, 2008 (73 FR 70488). Consistent with the administrative records for the 2008 changes to the terms of designations and the associated regulations for the two national marine sanctuaries, as well as comments received during the public comment period for the NPRM following

the then-Governor's objection, NOAA has determined that withdrawal of the NPRM is warranted.

ADDRESSES: For copies of related documents, you may obtain these through either of the following methods:

- Copies of the final environmental impact statement described in this document and the previous proposed rule may be viewed and downloaded at <http://sanctuaries.noaa.gov/jointplan>.
- Mail: David Lott, Regional Operations Coordinator, West Coast Region, Office of National Marine Sanctuaries, 99 Pacific Street, STE 200K, Monterey, CA 93940.

FOR FURTHER INFORMATION CONTACT:

David Lott, Regional Operations Coordinator, West Coast Region, Office of National Marine Sanctuaries, 99 Pacific Street, STE 200K, Monterey, CA 93940; 831-647-1920.

SUPPLEMENTARY INFORMATION:

I. Background

A. Regulatory Background

Pursuant to section 304(e) of the National Marine Sanctuaries Act (16 U.S.C. 1434 et seq.; NMSA), the Office of National Marine Sanctuaries (ONMS) conducted a joint review of the management plans for Gulf of the Farallones, Monterey Bay and Cordell Bank national marine sanctuaries (hereafter referred to as the "Joint Management Plan Review (JMPR)"). This process updated the existing regulations for these sanctuaries and allowed ONMS to ensure consistency across the region. The range of

alternatives NOAA considered was evaluated and made available to the public through the development of a draft and final environmental impact statement pursuant to the National Environmental Policy Act (NEPA). This review resulted in revised management plans, regulations, and terms of designations for all three sanctuaries. On November 20, 2008, NOAA published the associated final rule and terms of designation for the Jmpr (73 FR 70488) and released the revised management plans. In the final rule, NOAA changed the terms of designation for GFNMS and MBNMS to clearly allow regulation of introduced species. NOAA's regulations prohibited the introduction of introduced species into the sanctuaries with exceptions for striped bass caught and released during fishing and current state-permitted mariculture activities in GFNMS's Tomales Bay.

Pursuant to section 304(b) of the NMSA, changes to a sanctuary's terms of designation and the associated regulations only become effective after forty-five days of continuous session of Congress. After forty-five days, in this case on March 9, 2009, the regulations were to become final and take effect, except that any term of designation the Governor certified as unacceptable (i.e., objected to) would not take effect in the area of a sanctuary lying within the seaward boundary of the state ("state waters"). If exercised, the effect of a gubernatorial objection is that the term(s) of designation does not become effective in state waters. Any regulations that rely on the change in terms of designation also do not become effective in state waters.

On December 23, 2008, Governor Schwarzenegger objected to certain terms of designation for MBNMS and GFNMS that would have allowed NOAA to regulate the "introduction of introduced species" into those sanctuaries. The Governor's objection

was conditional: it would not apply if NOAA were willing and able to modify its regulations to except (i.e., allow) all state-permitted introduced species aquaculture activities in the two sanctuaries and also allow research involving the introduction of introduced species in MBNMS.

After receiving the Governor's objection, NOAA worked with staff from the California Natural Resources Agency and the California Department of Fish and Game to find solutions to the Governor's concerns that would also meet NOAA's goals. For GFNMS, NOAA proposed to conduct a process to modify the regulations on introduced species to except (allow) state-permitted aquaculture in state waters of that sanctuary and also agreed to not enforce the introduced species provisions in the state waters of GFNMS until such new rulemaking could be conducted and public comment on the matter could be considered.

For MBNMS, NOAA was willing and able to amend the regulations to include the same exception for state-permitted aquaculture in state waters. NOAA could not agree, however, to also create an exception for research involving the introduction of introduced species in the MBNMS, as the Governor requested. Despite discussions with the state, state officials never provided NOAA with a reason or scientific justification why such an exemption for research would be needed. Neither the Governor nor the state agencies with which NOAA worked provided any description of how this exception would be used, what types of research activities would qualify, or what the effect of it would be on sanctuary resources. Because no compromise was attained, the Governor's objection applied to the term of designation for the regulation of introduced species in the state waters of MBNMS. As indicated in the notice of effective date (March 23, 2009; 74

FR 12088), the regulation of the introduction of introduced species from within or into MBNMS does not apply in state waters of the sanctuary; it is valid and in effect only in the federal waters of the sanctuary, i.e., the area lying beyond the seaward boundary of the state.

II. Basis for Withdrawing the Proposed Rule

In response to Governor Schwarzenegger's objection and based upon discussions with the state, on October 1, 2009, NOAA issued a proposed rule (74 FR 50740) to modify the introduced species regulations to allow all state-permitted aquaculture activities in the state waters of GFNMS, and to clarify that the prohibition against release of introduced species did not apply in state waters of MBNMS.

NOAA took this action because, as previously noted, the Governor's certification as unacceptable of the new terms of designation for GFNMS and MBNMS prevented the introduced species regulations from applying within state waters of the two sanctuaries. For GFNMS, the proposed rule was NOAA's effort to meet the Governor's concerns while still keeping most of the protections that would be realized by prohibiting the introduction or release of invasive or genetically altered species anywhere in the sanctuary. As also previously noted, NOAA was not able to reach an acceptable basis that would meet the Governor's demand for an exception to the prohibition that allows state-permitted research involving these species within state waters of MBNMS. In NOAA's view, the state was unable to provide necessary information to justify the exception. For MBNMS, the proposed rule restricted the application of the introduced species prohibition to the federal waters of the sanctuary.

No new information was received by NOAA during the public comment period from members of the public or the state that would support modifying the introduced species prohibitions as originally promulgated. NOAA received and considered five public comments in response to the NPRM. Several distinct issues were raised in these comments: (1) support for the original regulations as promulgated for both sanctuaries; (2) support for the authority of the state regarding management of resources within state waters; (3) concern regarding the lack of protection to sanctuary resources that the then-Governor's objection would cause; and (4) concern over communication between the federal and state governments leading to the impasse on this issue.

Because there was never any valid reason or basis provided by the then-Governor, or received during the public comment period, for conducting research involving the introduction or release of introduced species, and because neither the state nor the public review process has identified why a patchwork of regulations and exemptions across the sanctuaries offshore California is beneficial, NOAA does not believe the resources of the sanctuaries would be adequately protected by the proposed rulemaking and notes the possibility of confusion among members of the public regarding different prohibitions in geographically close sanctuaries.

For these reasons, NOAA has concluded that the proposed rule is no longer warranted and is therefore withdrawing it. The legal effect of this action is that the Governor Schwarzenegger's letter of December 23, 2008, certifies as unacceptable the terms of designation for GFNMS and MBNMS regarding the regulation of introduced species in the two sanctuaries and modifies the terms of designation for each sanctuary

by limiting the application of terms regarding introduced species to federal waters. As a result, the regulations implementing these terms do not apply in state waters in either GFNMS or MBNMS (15 CFR 922.82(a)(10) and 922.132(a)(12), respectively). NOAA will be publishing in the Federal Register a notice of proposed rulemaking to revise the terms of designation for these two sanctuaries regarding introduced species and regulations that would apply in both state and federal waters.

III. Withdrawal

In consideration of the foregoing, NOAA has determined that the NPRM for NOAA Docket No. NOAA–NOS–2009–0105, as published in the **Federal Register** on October 1, 2009 (74 FR 50740), is hereby withdrawn.

Dated: March 11, 2013.

Holly A. Bamford, Ph.D.

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National Oceanic and Atmospheric Administration

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